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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 222

C. C. DIXON,

Petitioner,

versus

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HARRY M. WILSON,
Counsel for Petitioner.

P. O. Address:
Waycross, Georgia.

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A.

Jurisdiction.

The Judgment of the Circuit Court of Appeals was entered May 25, 1951, (R. 179), and motion for re-hearing denied June 19, 1951. The Jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of June 25, 1948; U. S. C. A. Title 28, Sec. 1254(1).

B.

Questions Presented.

1. Whether the appellate court can consider as error an excerpt from a charge of the trial court, to which counsel for the railroad made no exception whatever prior to the time same reached the appellate court, and which excerpt states a principle of law, heretofore ruled to be correct by this court.

2. Whether there is any valid exception in the record upon which the Appellate Court may consider the railroad's objection to the failure of the trial court to instruct the jury in terms of its requests, where counsel for the railroad made no exception to the charge as given on any ground that it was inadequate, misleading or incorrect in any respect, and the sole exception made by counsel for the railroad to the failure of the court to charge its requests was, "May we have an exception to Your Honor's failure to charge our requests?", to which the court replied, "Yes, but I think I have charged substantially all

you have in your requests", and counsel for the railroad still wholly failed to point out anything wrong with the charge as given, or any way in which the requested instructions would clarify or perfect same, or to bring into focus the nature of any alleged error and thus afford the court an opportunity to correct same.

3. Whether a charge as given by the trial court becomes the law of the case where there is no exception to same on any ground that it was inadequate, misleading or incorrect, and nothing is pointed out to bring into focus the nature of any alleged error in the charge, and thus afford the court an opportunity to correct same.

4. Whether in an action under the Federal Employer's Liability Act of April 22, 1908, as amended by the Act of August 11, 1939, in a case in which the danger was not ordinarily incident to the employment, but which resulted from the negligence of the employer, the trial court is required to instruct the jury, on request by the railroad, that it is the duty of an employee to exercise reasonable and ordinary care for his own safety, and whether it was reversible error for the trial court to fail to so instruct the jury.

5. Whether it is reversible error in an action under the Federal Employer's Liability Act for the trial court to instruct the jury, "If you find that the defendant company required its servant, C. C. Dixon, to work in a place which the railroad or its foreman knew to be unsafe, or which the foreman in the exercise of reasonable prudence ought to have known was unsafe, then the defendant is

liable for injuries to its servant if those injuries resulted from an unsafe and dangerous place to work, * * * as alleged in plaintiff's petition * * *."

6. Whether the trial court is required in an action under such Act to instruct the jury, at the request of the railroad, that the employer is not the insurer of the safety of its employees while they are on duty; and whether it is reversible error for the court to fail to so instruct the jury.

C.

Statement of Matter Involved.

The plaintiff, C. C. Dixon, was employed as a machinist at the round house in the repair shops of the railroad at Waycross, Georgia. He was injured in line of duty at night, (R. 14) when, on account of being unable to see due to defective lighting, he attempted to plug a lead cord from a light wire into a welding socket carrying 440 volts, (R. 15, 16, 17), on which welding socket the master switch had been left in contact contrary to custom of the railroad, (R. 104, 117). Action was instituted by plaintiff under the Federal Employer's Liability Act in the District Court of the United States for the Southern District of Georgia, Waycross Division. At the conclusion of the evidence, argument of counsel, and charge of the court, the jury returned a verdict in favor of the plaintiff. On appeal, the Circuit Court of Appeals for the Fifth Circuit reversed (R. 179). The facts are as follows:

The light receptacles and welding receptacles were kept on different posts in the round house at Waycross; (R. 101) there were no warning signs of any kind on or about the welding receptacle to warn a person of its danger (R. 17); the lights in the round house were defective (R. 15) and the light immediately above the welding socket and on the same post was out which was known to the foreman (R. 109); it was fifty two feet between the lights that were burning (R. 114); the lights in the round house were so poor that a person had to be right at a post to see it (R. 59); plaintiff's foreman knew that the welding socket was dangerous and that four hundred and forty volts would kill a person (R. 109); the welding receptacle had a master switch on it, and when this switch is pulled no current would pass through the receptacle (R. 117); it was the duty of the welder who last used the welding receptacle always to pull off the switch so that it could not carry electricity; this was not done (R. 117, 104).

Plaintiff's duties did not require using welding receptacle, and plaintiff had no experience with same, and did not know the location of same. No one had ever told plaintiff about the welding socket or its location, nor warned him of its danger (R. 16, 17, 32).

In line of his duty plaintiff undertook to connect the lead cord of a light socket, but in the darkness was unable to distinguish the welding socket, and touched the light cord to the welding socket; the moment he touched the socket he was knocked down (R. 32), suffering a broken back and other serious injuries.

Photographs of the light and welding receptacles introduced in evidence (Railroad's Exhibits 4-A, 4-B, 4-C and 4-D, in record as original exhibits for inspection by the court) show that the two receptacles and the male plugs for each are so similar that it would be almost impossible to distinguish between them except under most ideal lighting conditions.

The jury returned a verdict for petitioner, and motion for new trial was overruled by the trial court (R. 172). On appeal the Circuit Court of Appeals for the Fifth Circuit reversed the judgment of the trial court.

Counsel for the railroad made only one exception to the charge of the court as given, which was promptly corrected by the court (R. 163, 165). Counsel for the railroad made no other exception whatever to the charge of the court as given.

One of the main grounds on which the Circuit Court of Appeals reversed the judgment was the charge of the trial court to the effect that if the railroad required its servant to work in a place which the railroad knew to be unsafe, or which the foreman in the exercise of reasonable prudence should have known to be unsafe, then the defendant is liable for injuries to its servant if those injuries resulted from an unsafe and dangerous place to work. Counsel for the railroad made no exception whatever to this charge of the court.

Counsel for the railroad requested the trial court to instruct the jury in substance that it is the duty of an

employee to exercise reasonable and ordinary care for his own safety; that the employer is not the insurer of the safety of its employees; that it is not actionable negligence that an employer fails to anticipate lack of care on the part of an employee. The trial court did not give these in the words of the requests, and the only exception made by counsel to the failure of the court to give such requested instructions was: "May we have an exception to Your Honor's failure to charge our requests?", to which the court replied: "Yes, but I think I have charged substantially all you have in your requests." Counsel for the railroad made no exception to the charge as given on any ground that same was inadequate, misleading or incorrect, nor did counsel point out any way in which the requested instructions would clarify or perfect same, nor in any way bring into focus the nature of any alleged error and thus afford the court an opportunity to correct same.

D.

Reasons Relied on for Allowance of Writ.

1. The United States Circuit Court of Appeals for the Fifth Circuit has rendered decision on important questions of Federal Law which is contrary to applicable decisions of this court and various other Circuit Courts of Appeal, and contrary to Rule 51 of Civil Rules of Procedure, which is important to a correct and uniform application of the Federal Employer's Liability Act in the federal court, namely: in holding as error an excerpt from the charge of the trial court to which no exception

was made prior to the time same reached the appellate court, contrary to Rule 51, Rules of Civil Procedure, and which excerpt stated principles heretofore recognized by this court; in reversing said case on the refusal of the trial court to charge a request that it is the duty of the employee to exercise reasonable and ordinary care for his own safety, when the negligence charged resulted from the employer's negligence and a danger not ordinarily incident to the employment; in reversing said case on the refusal of the trial court to charge a request that the employer is not the insurer of the safety of its employees; in reversing said case on the refusal of the trial court to charge the jury that it is not actionable negligence that an employer fails to anticipate lack of care on the part of an employee, in a case in which there was no such charge of negligence in the pleadings nor the evidence; in failing to consider the charge of the trial court as the law of the case where there is no exception to same on any ground that it was inadequate, misleading or incorrect, and nothing is pointed out to bring into focus the nature of any alleged error in the charge, and thus afford the court an opportunity to correct same; in reversing said case on the failure of the court to give the railroad's requested instructions where no valid objection was made to the failure of the court to give such instructions.

2. The decision of the Circuit Court of Appeals for the Fifth Circuit, although contrary to decisions of this court, the various Circuit Courts of Appeals, and the Federal Rules of Civil Procedure, will stand as a mandate to the Federal District Courts in the Fifth Circuit to charge

the jury in all cases brought under the Federal Employer's Liability Act as set out in said decision, greatly to the injury and prejudice of this and other plaintiffs proceeding under such Act, and set up as a binding precedent in the Fifth Circuit that it is unnecessary for counsel in making exceptions to a charge to bring into focus the precise nature of any alleged error, thereby affording the court an opportunity to correct same, even after the court had stated to counsel that he thought he had charged the substance of the requests, and further set up as a binding precedent that a charge of the trial court, unexcepted to, does not become the law of the case.

A supporting brief accompanies this petition.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue to review the order of final judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered by that court in this case on May 25, 1951, and that said order of final judgment may be reversed by this Honorable Court, and that your petitioner may have such other and further relief as this Honorable Court may deem proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

1.

Questions of the Courts Below.

The opinion of the United States Circuit Court of Appeals, Fifth Circuit, (R. 179) has not yet been reported. The District Court of the United States for the Southern District of Georgia did not deliver a written opinion.

2.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended; U. S. C. A. Section 347(a). The judgment of the United States Circuit Court of Appeals, Fifth Circuit, to be reviewed, was entered May 25, 1951, and motion for rehearing denied on June 19, 1951.

3.

Statement of the Case.

A statement of the case appears under heading "C" of the petition for writ of certiorari. In the interest of brevity, that statement is not now repeated, but it is referred to, with the request that it be here considered as incorporated by reference.

4.

Questions Presented.

The questions specifically brought forward by Petition for Writ of Certiorari appear under heading "B" of the petition. Again, in the interest of brevity, they are not now repeated, but are referred to, with the request that they be considered as here incorporated by reference.

5.

Specification of Errors.

1. The Circuit Court erred in holding as reversible error an excerpt from the charge of the trial court to which no exception whatever was made prior to time same reached appellate court, and which excerpt is very nearly in the words of a decision of Supreme Court, and states a principle approved by the court.

2. The Circuit Court erred in reversing trial court for failure to give requested instructions when no valid exception was made thereto in the trial court.

3. The Circuit Court erred in failing to recognize the charge of the trial court as the law of the case when there was no exception to same on any ground that such charge was inadequate, misleading or incorrect.

4. The Circuit Court erred in holding that the trial court should have instructed the jury that it is the duty of an employee to exercise reasonable and ordinary care

for his own safety in Federal Employer's Liability cases, in a case in which the danger was not ordinarily incident to the employment, but resulted from the negligence of the employer.

5. The Circuit Court erred in holding that the trial court erred in charging the jury "if you find that the defendant required its servant, C. C. Dixon, to work in a place which the railroad or its foreman knew to be unsafe, or which the foreman in the exercise of reasonable prudence ought to have known was unsafe, then the defendant is liable for injuries to its servant if those injuries resulted from an unsafe and dangerous place to work as alleged by plaintiff's petition * * *."

6. The Circuit Court erred in holding that the trial court should have instructed the jury that the employer is not the insurer of the safety of its employees while they are on duty.

6.

ARGUMENT.

Summary of Argument.

The Summary of Argument is identical with Specification of Errors which appears under heading "5" next above. In the interest of brevity that statement is not now repeated, but is referred to with the request that it be considered as incorporated by reference.

1. THE CIRCUIT COURT ERRED IN HOLDING AS REVERSIBLE ERROR AN EXCERPT FROM THE CHARGE OF THE TRIAL COURT TO WHICH NO EXCEPTION WAS MADE IN THE TRIAL COURT, AND WHICH EXCERPT IS IN WORDS VERY SIMILAR TO AND WE THINK MEANING THE SAME AS DECISION OF SUPREME COURT.

The Circuit Court held that it was reversible error for the trial court to charge the jury as follows:

> "I charge you, gentlemen of the jury, as a matter of law, if you find that the defendant company required its servant, C. C. Dixon, to work in a place which the railroad or its foreman knew to be unsafe, or which the foreman in the exercise of reasonable prudence ought to have known was unsafe, then the defendant is liable for the injuries to its servant if those injuries resulted from an unsafe and dangerous place to work, as alleged in the plaintiff's petition, and it would be your duty to return a verdict for the plaintiff." (R. 182.)

Counsel for the railroad made no exception whatever to this charge in the trial court. The first exception was in the Appellate Court.

The decision of the Circuit Court of Appeals for the Fifth Circuit is contrary to numerous decisions of various circuit courts to the effect that a charge unexcepted to in the trial court becomes the law of the case:

> *Rittgers v. United States, 154 Fed. 2nd, 768 (5) (8th Cir.).*

F. W. Woolworth Co. v. Carriker, 107 Fed. 2nd, 689 (2) (8th Cir.).

Kurn v. Stanfield, 111 Fed. 2nd, 469 (11) (8th Cir.).

Guardian Life Ins. Co. of America v. Kissner, 111 Fed. 2nd, 532 (2) (8th Cir.).

New York Life Ins. Co. v. Stone, 80 Fed. 2nd, 614 (1) (1st Cir.).

Fuller v. Schuh-Mason Lbr. Co., 6 Fed. 2nd, 531 (1) (8th Cir.).

Yelloway Inc. v. Hawkins, 38 Fed. 2nd, 731 (6) (8th Cir.).

Grant Storage Battery Co. v. Delay, 87 Fed. 2nd, 726 (1) (8th Cir.).

American Locomotive Co. v. Harris, 239 Fed. 234 (1) (1st Cir.).

Nunan v. Timberlake, 85 Fed. 2nd, 407, 408 (9) (C. C. D. C.).

Pistorio v. Washington & F Co., 46 App. D. C. 479.

Cohen v. Evening Star Newspaper Co., 113 Fed. 2nd, 523 (3-4) (5th Cir.).

and is contrary to Rule 51 of the Rules of Civil Procedure, which is as follows:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests for the court to instruct the jury on the law as set forth in the requests. * * * No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating distinctly the matter to which he objects and the grounds of his objection * * *."

And is contrary to decision of United States Circuit Court of Appeals for the Third and Seventh Circuits, to the effect that Rule 51 is designed to preclude counsel from assigning for error on appeal matter at the trial which he did not fairly and timely call to the attention of the trial court.

Stillwell v. Hertz Driv-Ur-Self Stations Inc., 174 Fed. 2nd 714 (3rd Cir.).

Stueber v. Admiral Corporation, 171 Fed. 2nd, 777 (7th Cir.) (Cert. denied, 336 U. S. 961).

The Circuit Court held that such charge was an erroneous statement of the law, and that same presented, as the sole criterion of liability, knowledge of the employer or its representative that the place or tools provided for the employee's use were unsafe. The charge, was, we believe, a correct statement of the law under the ruling of this court in the case of

Urie v. Thompson, 69 S. Ct. page 1020 (head note 20).

In the case of *Urie v. Thompson, supra,* this court said:

> "Negligence within Federal Employer's Liability Act existed if the employer knew or by the exercise of due care should have known that prevalent standards of conduct were inadequate to protect employee and similarly situated employees."

See also *Hough v. Texas & Pacific R. R. Co.,* 25 L. Ed. page 616.

In this opinion the court quoted approvingly *Wharton on the Law of Negligence* as follows:

> "If a master knows or in the exercise of due care might have known that his structures or engines were insufficient, either at the time of procuring them, or at any subsequent time, he failed in his duty."

See also *56 C. J. S. page 1000, paragraph 244.*

> "The master's liability for injuries to a servant arising from defects in the place of work or in the machinery or appliances, is dependent on his knowledge, actual or constructive, of such defects. If he knew, or should have known by the exercise of reasonable care and diligence of their existence, he is liable, since negligent ignorance is equivalent to knowledge and an employer chargeable with knowledge has the duty to warn his servant of dangers and to provide reasonably safe means of avoiding them."

2. THE CIRCUIT COURT ERRED IN REVERSING TRIAL COURT FOR FAILURE TO GIVE REQUESTED INSTRUCTIONS WHEN NO VALID EXCEPTION WAS MADE IN THE TRIAL COURT TO THE REFUSAL TO GIVE SUCH REQUESTED CHARGES.

Counsel for the railroad made only one exception to the charge as given, which the court promptly corrected (R. 163, 165). After the court had received requests to charge from both sides, and had delivered the charge and excused the jury for exceptions to be made, counsel for the railroad made this simple exception to the failure of the court to give requested instructions: "May we have an

exception to Your Honor's failure to charge our requests?", to which the court replied, "Yes, but I think I charged substantially all you have in your requests to charge." Counsel for the railroad then stated, "But we want the record to show that we except to the failure of the court to charge requests Numbers 1, 2, 3, 4, 5 and 6". (R. 162 through 164.) This constituted the entire exception made by counsel for the railroad to the failure of the court to give requested instructions. Counsel in no way contended that the charge as given was inadequate, misleading or incorrect, nor in any way attempted to point out or bring into focus how such requested instructions would clarify or perfect the charge as given, nor wherein same were necessary. The Circuit Court of Appeals, in considering the exceptions, all of which were to failure to charge requests, and in holding that the trial court erred in failing to give such requested instructions when no valid exception was made thereto, held in substance that a party may assign as error the failure to give an instruction without objecting thereto and at the time *stating distinctly the matter to which he objects and the grounds of his objection in the trial court.* Such ruling is contrary to

Rule 51, Rules of Civil Procedure

and contrary to principles laid down by this court. In *Palmer v. Hoffman*, 63 S. Ct. 477, 483, 87 L. Ed. 645, this court held:

> "Under these facts a general exception is not sufficient. In fairness to the trial court and to the parties,

> objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial."

In the case of *Palmer v. Hoffman, supra,* request to charge was filed, the charge did not include request, the court advised counsel that the general principles had been given, counsel objected to failure to give the request, and made one additional objection, and the court corrected the charge in that respect. This court ruled that such exception was insufficient.

See in this connection also:

Lincoln v. Claflin, 19 L. Ed. 106.
Beaver v. Taylor, 93 U. S. 46, 54, 55, 23 L. Ed. 797.
Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584, 596, 4 S. Ct. 566, 28 L. Ed. 527.
McDermott v. Severe, 202 U. S. 600, 611, 26 S. Ct. 709, 713, 50 L. Ed. 1162.
Norfolk & W. Ry. Co. v. Earnest, 229 U. S. 114, 122, 33 S. Ct. 654, 657, 57 L. Ed. 1096.
Pennsylvania R. Co. v. Minds, 250 U. S. 368, 375, 39 S. Ct. 531, 533, 63 L. Ed. 1099.

Had the Circuit Court of Appeals considered this rule as construed by this court there were no exceptions to the charge, and the case being reversed entirely on the charge would of necessity be affirmed instead of reversed.

3. THERE BEING NO EXCEPTION TO THE CHARGE WHICH WAS NOT CORRECTED BY THE COURT, THE CHARGE AS GIVEN BECAME THE LAW OF THE CASE.

Only one exception being made to the charge of the court, and that being promptly corrected by the court, the charge as given became the law of the case, and the Appellate Court erred in not considering such rule and reversing the case on the charge of the court.

We have cited innumerable authorities supporting this contention under Ground 1, page 15 of this brief. In the interest of brevity we will not repeat same here, but they are referred to with the request that they be considered as incorporated by reference.

4. THERE IS NO DUTY ON THE EMPLOYEE TO EXERCISE ORDINARY CARE TO DISCOVER DANGERS NOT ORDINARILY INCIDENT TO THE EMPLOYMENT, BUT WHICH RESULT FROM THE EMPLOYER'S NEGLIGENCE.

Petitioner having been injured by reason of the Railroad's employees having left the master switch on welding socket in contact, contrary to custom of the company, and petitioner not being a welder and having no occasion to anticipate such danger, same was not ordinarily incident to his employment and resulted from the employer's negligence.

The Circuit Court of Appeals ruled that the trial court should have charged the jury that it is the duty of an

employee to exercise reasonable and ordinary care for his own safety. (R. 181.) Such ruling is contrary to

Tiller v. Atlantic Coast Line Ry. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610.

wherein it is ruled that for all practical purposes, since every vestige of assumption of risk on part of the employee is abolished, and contributory negligence is not a defense, but only reduces the damage, the question to be determined in a case under Federal Employer's Liability Act is whether defendant was guilty of any negligence proximately causing the injury.

Chesapeake and Ohio Ry. Co. v. Proffitt, 242 U. S. 462, 468, 36 S. Ct. 620, 60 L. Ed. 1102

wherein the court ruled, "The employee is not obliged to exercise care to discover dangers not ordinarily incident to the employment, but which result from the employer's negligence".

Pennsylvania Co. v. Cole, 214 Fed. 948 (6th Cir.)

to the effect that no amount of negligence on the part of injured employee can bar recovery, where any negligence contributing to the injury exists on the part of employer.

5. THE PART OF THE CHARGE GIVEN UPON WHICH CIRCUIT COURT OF APPEALS REVERSED TRIAL COURT WAS A CORRECT STATEMENT OF THE LAW AS CONSTRUED BY THIS COURT.

The trial court charged the jury in substance that "if you find that the defendant required its servant, C. C.

Dixon, to work in a place which the railroad or its foreman knew to be unsafe, or which the foreman in the exercise of reasonable prudence ought to have known was unsafe, then the defendant is liable for injuries to its servant if those injuries resulted from an unsafe and dangerous place to work * * *".

The Circuit Court held that such charge was error as placing too great a burden on the railroad (R. 182).

Such ruling is contrary to the holding of this court in:

Urie v. Thompson, 69 S. Ct. 1020 (Head Note 20)

wherein the principle contained in this charge was approved as being a correct statement of the law.

6. IT IS NOT NECESSARY FOR THE TRIAL COURT TO GIVE A NEGATIVE INSTRUCTION OF WHAT THE RAILROAD IS NOT.

The Circuit Court held that the trial court should have instructed the jury, on request, that the employer is not the insurer of the safety of its employees while they are on duty (R. 183).

The question of whether the railroad was insurer of its employees was not involved in the case, and the holding of the Circuit Court of Appeals is not in harmony with

Titusville Fruit & Farm Lands Co. v. Porter, 249 Fed. 442 (3) (5th Cir.)

wherein it is held that the court is not bound to give a cautionary instruction, nor to negative issues in no way involved. Such course would open the door for an indefinite number of unnecessary cautionary instructions.

Remer v. Flying Eagle Whiteway Lines, 172 Fed. 2nd, 831 (3) (2nd Cir.), wherein it is held that it is not error to refuse a requested charge that the defendant is not an insurer or guarantor of the safety of its employees.

CONCLUSION.

In conclusion, counsel for petitioner respectfully submit:

1. That this case was reversed by the Circuit Court of Appeals for the Fifth Circuit solely on the charge of the trial court, and that the ruling of the Circuit Court herein is erroneous for all the reasons set out in this petition and brief.

2. The decision of the Circuit Court of Appeals is on important questions of Federal law and is contrary to applicable decisions of the Supreme Court, various other Circuit Courts of Appeal, and Rule 51 of Civil Rules of Procedure, and opens wide the floodgate of grounds of appeal without prior exception to the charge in the trial court.

3. It is important to a correct and uniform application of the Federal Employer's Liability Act that the decision

of the Circuit Court of Appeals for the Fifth Circuit be reversed and made to conform to applicable decisions of this court, the various other Circuit Courts of Appeal, and to Rule 51, Civil Rules of Procedure.

4. If the decision of the Circuit Court of Appeals for the Fifth Circuit in this case is not reversed, it will stand as a mandate to the District Courts and the State Courts in the Fifth Circuit to charge the jury as set out in said decision, contrary to holdings of this court and various other Circuit Courts of Appeal, and will set up as a binding precedent of appeal that it is unnecessary to make exception to the charge in the trial court, greatly to the injury and prejudice of this and other plaintiffs bringing actions under Federal Employer's Liability Act in Federal or State Courts, and to all parties who may expect the protection of Rule 51 in exceptions to charge.

5. That a writ of certiorari, therefore, should be granted, and that this Court should review and reverse the decision of the Circuit Court of Appeals and affirm the judgment in the trial court.

Respectfully submitted,

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Waycross, Georgia.

ACKNOWLEDGMENT OF SERVICE.

We hereby acknowledge due service of petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and brief in support thereof, and waive service of copy of the record, in the case of C. C. DIXON, Petitioner, versus ATLANTIC COAST LINE RAILROAD COMPANY, Respondent.

This .... day of ....., 1951.

LARRY E. PEDRICK,
Counsel for Respondent.

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The Supreme Court of the United States

OCTOBER TERM, 1951

No. 222

C. C. DIXON,

Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,
a corporation,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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WILMINGTON PRINTING COMPANY

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Summary Statement of Controversy

The Petitioner seeks access to this Court on the ground that sufficient exceptions were not taken in the trial court by Respondent to the trial judge's failure to give charges requested by the Respondent, on account of which failure alone the judgment recovered by Petitioner was reversed by the Court of Appeals. We show in the second subdivision of this brief, page 2, that the exceptions were entirely sufficient, both in the eye of this Court, and to the mind of the Court of Appeals.

The opinion of that Court is reported as *Atlantic Coast Line R. Co.* v. *Dixon*, 189 F. 2d 525, and was rendered May 25, 1951; rehearing was denied June 19, 1951.

The petition should be denied because:

1. No reason is shown to justify this Court in granting certiorari.

2. The respondent's exceptions to failure to charge were sufficient.
3. The decision of the Court of Appeals was right.

1. No Reason Is Shown to Justify This Court in Granting Certiorari.

The Court of Appeals properly decided that the trial judge erroneously failed to instruct the jury upon the material and relevant principles which are "implicit in every action of this nature." (189 F. 2d 525, 528).

The decision is not in conflict with any decision of another Court of Appeals, nor is it in conflict with any decision of this Court. The questions decided are not new ones. They are recognized by all the courts.

All that the decision does is to remand the case for another trial so that another jury may be correctly instructed as to the principles of law which necessarily must be applied before a just verdict can be rendered.

The petition does not measure up to Rule 38 (5-b) of this Court.

United States v. *Rimer, U. S.* 547, 55 L. Ed. 578 (1911);

Magnum Import Co. v. *De Spoturno Coty*, 262 U. S. 159, 67 L. ed. 922, 924 (1923);

Southern Power Co. v. *North Carolina Public Service Co.*, 263 U. S. 508, 68 L. ed. 413 (1924).

2. The Respondent's Exceptions to Failure to Charge Were Sufficient.

The record shows, at page 162, that the requirements of Rules 51 and 46 of the Rules of Civil Procedure were adequately complied with to the satisfaction of the trial judge and counsel when the following proceedings occurred:

"The Court:

Gentlemen, I think my charge covered your requests. I think I have got it in my charge substantially

everything you have in your requests to charge. I could have gone into more details but I don't think that is necessary. I have given them the law and I think it is a fair charge. I overrule all of your exceptions.

"Mr. Pedrick [for Respondent]:
May we have an exception to Your Honor's failure to charge our requests?

"The Court:
Yes, but I think I charged substantially all you have in your requests to charge.

"Mr. Pedrick:
But we want the record to show that we except to the failure of the Court to charge requests Numbers 1, 2, 3, 4, 5 and 6.

"The Court:
All right."

That was sufficient under the following authorities:

Wright v. *Farm Journal, Inc.*, 158 F. 2d 976 (2nd Cir. 1947);

Williams v. *Powers*, 135 F. 2d 153, 156 (6th Cir. 1943);

Peterson v. *Sheridan*, 115 F. 2d 121 (8th Cir. 1940);

Sweeney v. *United Feature Syndicate*, 129 F. 2d 904 (2nd Cir. 1942).

Those cases, and that quotation from the Record in this case, comport with the following statement by this Court in *O'Donnell* v. *Elgin, Joliet and Eastern Railway Co.*, 338 U. S. 384, 394, 94 L. Ed. 187, 194 (1949):

> "Criticism is made that petitioner's requests to charge were not sufficiently specific. That they were somewhat general in statement and were cast in terms of a negligence case is true. But the Court of Appeals found these requests sufficiently specific and pertinent to the issues to present the question which it decided."

Furthermore, the errors for which the judgment was reversed were so apparent that the Court of Appeals was justi-

fied in considering them and adjudging their harmfulness even if no exceptions had been made at all. For more than 50 years this Court has asserted its right to "notice a plain error, though not assigned". *United States* v. *Tennessee etc. R. Co.*, 176 U. S. 242, 256, 44 L. Ed. 452, 458 (1899).

And in like manner, the Court of Appeals for the 5th Circuit has consistently considered errors which it felt were so plain that they ought to be disposed of even though they were not the subject of an assignment of error. *White* v. *United States*, 202 F 501, 502 (5th Cir. 1913): "A plain error may be noticed by us, in the absence of an assignment"; *Grafton* v. *Meikleham*, 246 F. 737, 738 (5th Cir. 1917): "It is competent for the Court to notice a plain error in the absence of any assignment" — said in denying a motion to dismiss an appeal on the ground "that the assignments of error, because of their vagueness, would not support the appeal". *Dowell, Inc.* v. *Jowers*, 166 F. 2d 214, 221 (5th Cir. 1948).

The principle is respected by the Federal Courts of Appeals generally.

United States v. *Dieckmann*, 101 F. 2d 421, 424 (7th Cir. 1939);

Callen v. *Pennsylvania R. Co.*, 162 F. 2d 832 (3rd Cir. 1947);

Shokuwan Shimabukuro v. *Nagayama*, 140 F. 2d 13 (D.C. Cir 1944);

Hormel v. *Helvering*, 312 U. S. 552, 557, 85 L. Ed. 1037 (1941);

Rowlick v. *Greenfield*, 87 F. Supp. 997 (E. D. Penn 1949).

3. The Decision of the Court of Appeals Was Right.

These are the salient facts:

The Petitioner was an experienced machinist and was working in the round house of the respondent railroad company

at night. He intended to do some work on an engine and needed to plug in an extension cord to a receptacle in order to use the light attached to the other end of the cord. The light receptacle in which he should have plugged the cord was located on a post right along side the engine. Instead of plugging the light cord into the light receptacle the Petitioner went to a post 26 feet from the one on which the light receptacle was located, and forced the light plug into a welding receptacle carrying a higher voltage, thus receiving his injury. He knew that the welding receptacle was larger than the light receptacle and that the plug to be inserted into the welding receptacle was "about as big again as the plug intended for use in the light receptacle". (R. 26).

While the evidence was conflicting as to the general lighting conditions, and while Respondent said he did not know about the welding circuit, yet he was the only employee among all the witnesses for both sides, machinists, boilermakers, helpers and the like, who said he did not know the difference between the two, although they were different in size and shape. He charged that the defendant railroad was negligent in failing to provide a reasonably safe place in which to work, and with reasonably safe tools and appliances, and in failing to maintain reasonable safe tools and appliances, and in failing to maintain guards to prevent accidental contact with the power circuit.

The defendant requested the trial judge to charge certain fundamental principles which are inherent in every action of this nature (R. 149-151). The trial judge failed to do this, and it was on these exceptions to *the failure to charge*, that the Circuit Court reversed the case and remanded it for another trial.

One request was

> "that the railroad company" is not a guarantor or insurer of the safety of the place of work or of the ma-

chinery and appliances of the work. It is the duty of the railroad company to exercise reasonable care to the end that the employee, the plaintiff, be furnished with a reasonably safe place in which to work and reasonably safe tools and appliances. The test is whether reasonable or ordinary care has been exercised by the railroad company in this regard". (R. 150).

This is a correct statement of the law applicable to this case:

Seaboard Air Line Railway Company v. *Horton*, 233 U. S., 492, 58 L. Ed. 1062, 1069 (1914);

Hough v. *Texas & P. R. Co.*, 100 U. S. 213, 217, 25 L. Ed. 612 (1880);

Washington & G. R. Co. v. *McDade*, 135 U. S. 554, 570, 34 L. Ed. 235 (1890);

Choctaw, O. & G. R. Co. v. *McDade*, 191 U. S. 64, 67, 48 L. Ed. 96, 100 (1903);

Ellis v. *Union Pacific Railroad Company*, 329 U. S. 649, 91 L. Ed. 572 (1947);

Tiller v. *Atlantic Coast Line Railroad Company*, 318 U. S. 54, 87 L. Ed. 610 (1943);

Aqua System, Inc. v. *Kodakoski*, 88 F. 2d 395, 398 (5th Cir. 1937);

Baltimore & Ohio S. W. Railroad Company v. *Carroll*, 280 U. S. 491, 74 L. Ed. 566 (1930);

Yazoo and Mississippi Valley Railroad Company v. *Mullins*, 249 U. S. 531, 63 L. Ed. 754 (1919);

McGivern v. *Northern Pacific R. Co.*, 132 F. 2d 213 (8th Cir. 1942).

Another request was

"that the defendant railroad company under the law is not required to furnish the newest or even the safest and most approved devices if the employee is not deceived as to the degree of danger to which he is subjected". (R. 150).

This was a correct principle:

McGivern v. *Northern Pacific R. Company*, 132 F. 2d 213 (8th Cir. 1942);

Chicago & N. W. R. Co. v. *Bower*, 241 U. S. 470, 60 L. Ed. 1107, 1109 (1916);

Baltimore & Ohio R. Co. v. *Groeger*, 266 U. S. 521, 69 L. Ed. 419 (1925).

The court was also requested to charge

> "that it is not actionable negligence against the railroad company that such company fails to anticipate carelessness or lack of care upon the part of its employee, the plaintiff in this case". (R. 150, 151).

This was a very relevant instruction, supported by *McGivern* v. *Northern Pacific R. Co.*, 132 F. 2d 213 (8th Cir. 1942).

The other request was

> "that the rule applicable to all duties arising between the employer and employee in this case, that is between the plaintiff, C. C. Dixon and the defendant railroad company, is the requirement that each exercise reasonable or ordinary care in view of all the circumstances, and therefore negligence on the part of either the plaintiff or the defendant railroad company, would be the failure to exercise reasonable or ordinary care in view of all the circumstances". (R. 149, 150).

This properly defined the duty of both employer and employee:

Tiller v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 617 (1943);

Baltimore & Potomac R. Co. v. *Jones*, 95 U. S. 439, 24 L. Ed. 506, 507 (1877);

Texas & Pacific R. Co. v. *Barrett*, 166 U. S. 617, 41 L. Ed. 1136, 1139 (1897);

McGivern v. *Northern Pac. R. Co.*, 132 F. 2d 213, 217 (8th Cir. 1942);

Missouri Pacific R. Co. v. *Aeby*, 275 U. S. 426, 72 L. Ed. 351 (1928).

The Court of Appeals did not reverse the case upon the excerpt of the charge quoted on page 13 of the petition and brief. It held that that charge was not sufficient to cover the principles requested by Respondent and refused by the trial judge, saying:

> "The charge should have been supplemented by appropriate charges upon principles hereinabove set out, as requested by defendant. The failure to do so can not be regarded as harmless error, as the principles above referred to are implicit in every action of this nature." (R. 183) (189 F. 2d 528).

The simple fact of the whole business is that the instructions given the jury as a whole did not, as the Court of Appeals said, correctly inform the jury as "relevant and coordinate principles essential to a complete and accurate grasp by the jury of the considerations which underlie an employer's liability for negligent injuries to his employee". (189 F. 2d 528).

CONCLUSION

It is perfectly apparent that this is only the sort of case which it has been stated on high authority, though by way of dissent, should not be permitted to engage the attention of this Court, which ought, as necessarily it must, to be devoted to "cases that demand adjudication on the basis of importance to the operation of our federal system; importance of outcome merely to the parties is not enough". *Wilkerson* v.

McCarthy, 336 U. S. 53, 93 L. Ed. 497 (1948); *Carter* v. *Atlanta and St. Andrews Bay R. Co.*, 338 U. S. 430, 438, 94 L. Ed. 236 (1949).

It is therefore submitted that the petition for certiorari should be denied.

Respectfully submitted:

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CERTIFICATE OF SERVICE

The undersigned Charles Cook Howell hereby certifies that on the 31st day of August, 1951, he mailed a copy of the foregoing document to the following person, postage prepaid and properly addressed:

Harry M. Wilson
Waycross, Georgia

CHARLES COOK HOWELL